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No. 1030

In the Supreme Court of the United States

OCTOBER TERM, 1963

[redacted] G. HOUSEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	1
Constitutional provision and statute involved	2
Statement	2
Argument	6
Conclusion	13

CITATIONS

Cases:

Badeau v. *United States*, 130 U.S. 439	9
Chambers v. *Russell*, 192 F. Supp. 425	11
Clossen v. *Armes*, 7 App. D.C. 460	11
Franklin v. *United States*, 29 Ct. Cls. 6	9
Grisham v. *Hagan*, 361 U.S. 278	7
Hooper v. *Hartman*, 163 F. Supp. 437	5
Hooper v. *Hartman*, 274 F. 2d 429	4
Hostinsky v. *United States*, 292 F. 2d 508	9
Kahn v. *Anderson*, 255 U.S. 1	6, 9
Kinsella v. *Singleton*, 361 U.S. 234	7
McElroy v. *Guagliardo*, 361 U.S. 281	7
Morgenthau v. *Barrett*, 108 F. 2d 481	9
Reid v. *Covert*, 354 U.S. 1	7, 12
Runkle v. *United States*, 19 Ct. Cls. 396, reversed, 122 U.S. 543	9
Simcox v. *Madigan*, 298 F. 2d 742, certiorari denied, 370 U.S. 964	6
Taussig v. *McNamara*, 219 F. Supp. 757	11

732-836—64——1

Cases—Continued

	Page
Toth v. *Quarles*, 350 U.S. 11	6, 11
United States ex rel. Pasela v. *Fenno*, 167 F. 2d 593, certiorari granted, 334 U.S. 857, dismissed by stipulation of counsel 335 U.S. 806	9, 11
United States v. *Gay*, 264, U.S. 353	9
United States v. *Gillmore*, 189 Fed. 761	9
United States v. *Hooper*, 9 U.S.M.C.A. 637	4, 11
United States v. *Hooper*, 11 U.S.M.C.A. 128	4
United States v. *Kearney*, 3 J.A.G.D. Board of Review 63, C.M. 390711	10, 11
United States v. *Raines*, 362 U.S. 17	13
United States v. *Tyler*, 105 U.S. 244	8, 9
White v. *Treibly*, 19 F. 2d 712	9
Constitution and Statutes:	
Constitution of the United States, Article I, Section 8, Clause 14	2, 6
76 Stat. 1126	7
Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.*:	
Article 2	2
Article 2(4)	5, 6, 13
Article 125	2, 3
Article 133	2, 3
Article 134	3
5 U.S.C. 59a	7
10 U.S.C. 772	7
10 U.S.C. 1074	7
10 U.S.C. 1076	7
10 U.S.C. 1161	8
10 U.S.C. 6151	7
10 U.S.C. 6481	7
10 U.S.C. 7601–7605	7
18 U.S.C. 281	7

Miscellaneous:

	Page
53 Cong. Rec. 12844	11
7 Dig. Ops., Courts-martial, § 45.8	11
Manual of the Judge Advocate General, Navy Department, Sec. 0106c,(2)(a)	10
Winthrop's *Military Law and Precedents* (2d ed., 1920 reprint)	11

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No. 1030

SELDEN G. HOOPER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Claims (Pet. App. 1–10) is reported at 326 F. 2d 982.

JURISDICTION

The final judgment of the Court of Claims was entered on January 24, 1964. The petition for a writ of certiorari was filed on April 22, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether Article 2(4) of the Uniform Code of Military Justice is constitutional insofar as it provides

that a retired Naval officer drawing pay is subject to trial by court-martial.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Article I, Section 8, Clause 14 of the Constitution of the United States provides in pertinent part:

> Section 8. The Congress shall have Power * * * To make Rules for the Government and Regulation of the land and naval Forces.

Article 2 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 802, provides in pertinent part:

> The following persons are subject to this chapter:
>
> * * * * * *
>
> (4) Retired members of a regular component of the armed forces who are entitled to pay.

STATEMENT

In 1957 petitioner, a retired Rear Admiral of the United States Navy, drawing retirement pay in the amount of $433.83 per month, was charged (R. 1–4, 10)[1] with violation of Article 125 of the Uniform Code of Military Justice, dealing with sodomy,[2] Article 133, dealing with conduct unbecoming an offi-

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[1] "R." refers to the record certified by the Clerk of the Court of Claims and filed in this Court.

[2] ART. 125 (10 U.S.C. 925). "Sodomy.

"(a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.

"(b) Any person found guilty of sodomy shall be punished as a court-martial may direct."

cer and a gentleman,[4] and Article 134, dealing with acts to the prejudice of good order and discipline and conduct of a nature to bring discredit upon the armed forces.[5] He was alleged to have committed eight specific acts.

After trial by court-martial, petitioner was found to have performed three of the acts charged. Violation of Article 125 was found on the basis of an act of sodomy with an enlisted man of the United States Navy (R. 2, 5, 10)[6]; violation of Article 133 was found on the basis of public association with persons known to be sexual deviates (R. 3, 4, 5, 10)[7]; and violation of Article 134 was found on the basis of an

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[4] Art. 133 (10 U.S.C. 933). "Conduct unbecoming an officer and gentleman.

"Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct."

[5] Art. 134 (10 U.S.C. 934). "General article.

"Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of that court."

[6] "Specification 3: In that Seldon G. Hooper, Rear Admiral U.S. Navy (Retired), did, at 604 Glorietta Boulevard, Coronado, California, on or about 3 March 1957, commit sodomy with John Peter Schmidt, personnelman third class, U.S. Navy."

[7] "Specification 2: In that Seldon G. Hooper, Rear Admiral U.S. Navy (Retired), did, at Coronado, California, on or about 4 March 1957, publicly associate with persons known to be sexual deviates, to the disgrace of the armed forces."

indecent act committed with another enlisted man of the United States Navy (R. 3–4, 5, 10).[7]

The court-martial ordered that petitioner be dismissed from the service and forfeit all pay and allowances (R. 5, 10). This sentence was affirmed by a board of review, reversed by the United States Court of Military Appeals for deficiencies in the post-trial review, reviewed and affirmed again by a board of review, and then affirmed by the Court of Military Appeals. *United States* v. *Hooper*, 11 U.S.M.C.A. 128 (R. 5–6, 10). On January 7, 1961, the court-martial sentence was approved and ordered executed by the President (R. 6, 10). Petitioner's retirement pay and allowances were terminated as of that date (R. 7, 11).[8]

At all stages of the proceedings, petitioner preserved his objections to the jurisdiction of the court-martial. This issue was fully discussed and decided adversely to petitioner in the decision of the Court of Military Appeals in the first appeal from the court-martial. *United States* v. *Hooper*, 9 U.S.M.C.A. 637.

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[7] Specification: In that Seldon G. Hooper, Rear Admiral U.S. Navy (Retired), did, at 604 Glorietta Boulevard, Coronado, California, on or about 3 March 1957, wrongfully commit an indecent, lewd and lascivious act with Roscoe Kurtz Braddock, seaman, U.S. Navy, by embracing the nude body of said Braddock, while he, the said Hooper, was also nude."

[8] The court-martial did not order that petitioner be confined or restrained in any way, and during the trial and review proceedings petitioner was at no time subjected to arrest or to any other form of personal restraint. See pages 5, 63 of the Transcript of Record in *Hooper* v. *Hartman*, 274 F. 2d 429 (C.A. 9) (cited herein as "Appeal Rec."), filed in this Court as Exhibit A to the affidavit of Oscar F. Irwin. See Pet. 6 (footnote).

While the review proceedings were taking place, petitioner attempted a collateral attack in the United States District Court for the Southern District of California. That court refused to interfere with the proceedings on grounds, *inter alia*, that court-martial jurisdiction over petitioner was consistent with the Constitution, and that petitioner had not exhausted his military remedies. *Hooper* v. *Hartman*, 163 F. Supp. 437 (S.D. Calif.). The district court held that the requirement of exhaustion of remedies was properly applicable, since petitioner had not been confined and was not threatened with confinement. The Court of Appeals for the Ninth Circuit affirmed solely on the ground of failure to exhaust remedies. *Hooper* v. *Hartman*, 274 F. 2d 429.

This action was brought in the Court of Claims to recover retirement pay alleged to have accrued from and after January 7, 1961. The Court of Claims granted the government's motion for summary judgment, holding that Article 2(4) of the Uniform Code of Military Justice was constitutional as applied to this case. The court added (Pet. App. 10):

> [W]e are concerned in this case only with the power of Congress to provide that a retired officer can be dismissed from the service by a court-martial for offenses against the Uniform Code of Military Justice. We are not concerned with the authority of a court-martial to order the confinement of a retired officer and our holding does not reach that issue.

ARGUMENT

Article 2(4) of the Uniform Code of Military Justice renders subject to the Code "Retired members of a regular component of the armed forces who are entitled to pay." At the time of the court-martial in issue here, petitioner was a retired officer drawing pay and entitled to wear the uniform and use his military title. These and other connections with the Navy made him a continuing part of that service properly subject to court-martial jurisdiction under the express terms of Article 2(4). The holding of the Court of Claims recognizing the military status of retired officers is consistent with the decisions of this Court and with the historic practice of the armed services.

The decisions of this Court establish that Congress, in exercise of its power under Article I "To make Rules for the Government and Regulation of the land and naval forces," may exert court-martial jurisdiction over "persons who are actually members or part of the armed forces." *Toth* v. *Quarles*, 350 U.S. 11, 14-15. Court-martial jurisdiction has been held to reach a dishonorably discharged soldier in the status of a military prisoner serving a sentence imposed by a prior court-martial. *Kahn* v. *Anderson*, 255 U.S. 1; *Sinclair* v. *Madigan*, 298 F. 2d 742 (C.A. 9), certiorari denied, 370 U.S. 964. On the other hand, the Court in *Toth* invalidated the exercise of court-martial jurisdiction over one who had been honorably discharged and "had severed all relationship with the military and its institutions." *Toth* v.

Guarles, 350 U.S. at 14. Applying the same criteria, the Court rejected the claims of military jurisdiction over dependents and civilian employees accompanying the armed forces abroad in time of peace. *Reid v. Covert*, 354 U.S. 1; *Kinsella v. Singleton*, 361 U.S. 234; *Grisham v. Hagan*, 361 U.S. 278; *McElroy v. Guagliardo*, 361 U.S. 281.

Unlike the individuals in the latter cases, petitioner maintained a continuing connection with the Navy involving military rights, liabilities and duties. As a retired rear admiral, petitioner received substantial pay (10 U.S.C. 6151) and retained the right to wear his uniform on appropriate occasions (10 U.S.C. 772) and to use his rank. He could patronize commissary stores, officers clubs and armed services exchanges (10 U.S.C. 7601–7605) and could obtain medical treatment at armed services medical facilities (10 U.S.C. 1074, 1076). He was subject to obligations and restrictions indicating a substantial connection to the military. Without his consent, he could have been ordered to active duty by the Secretary of the Navy in time of war or national emergency. 10 U.S.C. 6481. Without a new induction, he could have been returned to active duty at any time with his consent. *Ibid.* He was prohibited from earning over $10,000 a year in retirement pay combined with the pay of other government employment. 5 U.S.C. 59a. And he was forbidden to represent any person in the sale of anything to the Department of the Navy. 18 U.S.C. 281; P.L. 87–849, 76 Stat. 1126. Petitioner's connection with the Navy was not a merely theoretical matter. In 1949—after his retirement—the Chief of Naval Per-

sonnel specifically authorized him to wear his uniform on appropriate occasions while employed as Superintendent of the West Coast Naval Academy (Appeal Rec. 45).*

Based upon these military rights and duties, the Congress and this Court have, from the time the retired list was first established, consistently recognized retired officers as part of the land or naval forces. Thus, in *United States* v. *Tyler*, 105 U.S. 244, 246, the Court held that retired officers "are in the military service * * * and that the increased pay of ten percent for each five years' service applies to the years so passed * * *." In words that forecast the holding of the Court of Claims in this case, the Court stated (*id.* at 246):

> It is impossible to hold that men who are by statute declared to be a part of the army, who may wear its uniform, whose names shall be

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* With such ties, the Navy could reasonably conclude that petitioner's conduct could bring the service into disrepute and accordingly warranted his dismissal. A court-martial proceeding was the only way in which petitioner could be dismissed. 10 U.S.C. 1161 provides as follows:

"(a) No commissioned officer may be dismissed from any armed force except—

"(1) by sentence of a general court-martial;

"(2) in commutation of a sentence of a general court-martial; or

"(3) in time of war, by order of the President.

"(b) The President may drop from the rolls of any armed force any commissioned officer (1) who has been absent without authority for at least three months, or (2) who is sentenced to confinement in a Federal or State penitentiary or correctional institution after having been found guilty of an offense by a court other than a court-martial or other military court, and whose sentence has become final."

> borne upon its register, who may be assigned by their superior officers to specified duties by detail as other officers are, who are subject to the rules and articles of war, and may be tried, not by a jury, as other citizens are, but by a military court-martial, for any breach of those rules, and who may finally be dismissed on such trial from the service in disgrace, are still *not* in the military service.

To the same effect, see *Badeau* v. *United States*, 130 U.S. 439,[10] and *United States* v. *Gay*, 264 U.S. 353. In *Kahn* v. *Anderson*, *supra*, 255 U.S. at 6–7, the Court reaffirmed its ruling in *Tyler*, holding that retired officers "are the officers in the military service of the United States" qualified to sit as members of a military court-martial. Other courts have reached the same conclusion in a variety of contexts. *Hostinsky* v. *United States*, 292 F. 2d 508 (Ct. Cls.); *Morgenthau* v. *Barrett*, 108 F. 2d 481 (C.A.D.C.); *White* v. *Treibly*, 19 F. 2d 712 (C.A.D.C.); *United States* v. *Giltmore*, 189 Fed. 761 (S.D.N.Y., Hand, J.); *Franklin* v. *United States*, 29 Ct. Cls. 6; *Runkle* v. *United States*, 19 Ct. Cls. 396, reversed on other grounds, 122 U.S. 543.

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[10] Under a statute prohibiting receipt of compensation for two offices in the government, the Court held that a retired army officer was not entitled to retirement pay for the periods in which he served abroad as a consul general. Despite cases which held that double compensation was permitted where the two offices were not "incompatible," the Court held that retired army officers holding diplomatic or consular appointments could not receive "pay as army officers during the period of time when they are absent from their country in the discharge of continuous official duties inconsistent with subjection to the rules and articles of war and the other incidents of military service." 130 U.S. at 451–452.

The issue presented here—whether court-martial jurisdiction may be exerted over retired officers—has not been extensively litigated, presumably because the military has exercised such jurisdiction only in rare cases.[11] However, those courts which have faced the question have upheld the jurisdiction. *Closson* v. *Armes*, 7 App. D.C. 460; *Chambers* v. *Russell*, 192 F. Supp. 425 (N.D. Calif.); cf. *United States ex rel. Pasela* v. *Fenno*, 167 F. 2d 593 (C.A. 2), certiorari granted, 334 U.S. 857, dismissed by stipulation of counsel, 335 U.S. 806 (in this case court-martial juris-

[11] In practice, the armed services recognize that retired personel are not "in" the service to the same extent as personnel on active duty and accordingly limit the circumstances in which court-martial jurisdiction given by the Uniform Code of Military Justice can be exercised. This policy was set forth in 1931 by Secretary of War Hurley in a letter to President Hoover recommending disapproval of a court-martial sentence of a retired Army officer. *United States* v. *Kearney*, 3 J.A.G.D. Board of Review 63, 79, C.M. 190711. This letter contained the following statement:

"It has been the immutable custom of the service that officers when retired, unless some extraordinary circumstances were involved linking them to the military establishment or involving them in conduct inimical to the welfare of the nation, would be subject only to the same police restrictions and jurisprudential processes as the ordinary civilian."

The Air Force requires prior approval of the Secretary of the Air Force before court-martial jurisdiction may be exercised over a retired person. The Air Force has exercised this jurisdiction in only one case. (An exception to this requirement is made in cases of personnel cashing worthless checks at United States military facilities abroad under circumstances evidencing fradulent intent.) The Navy requires prior approval of the Secretary of the Navy. Department of the Navy, *Manual of the Judge Advocate General*, Sec. 0106 c.(2)(a). The Army continues to follow the policy laid down in *Kearney*.

diction was exercised to put the relator in custody after recall to active duty for the sole purpose of court-martial); *Taussig* v. *McNamara*, 219 F. Supp. 757 (D.D.C.). Similarly, Colonel Winthrop, while expressing doubts about the jurisdiction over civilians generally, concludes "That retired officers are a part of the army and so triable by court-martial—a fact indeed never admitting of question * * *."[12]

The early origins and importance of court-martial jurisdiction over retired officers were stressed by President Wilson as grounds for vetoing a bill which would have terminated this jurisdiction. 53 Cong. Rec. 12844, quoted in *United States* v. *Hooper*, 9 U.S.M.C.A. 637, 643–645. The President pointed out that officers on the retired list are "members of the Army, officers of the United States, exemplars of discipline, and have in their keeping the good name and the good spirit of the entire Military Establishment before the world. Occupying such a relation, their subjection to the rules and Articles of War and to trial by general court-martial have always been regarded as necessary, in order that the retired list might not become a source of tendencies which would weaken the discipline of the active land forces and

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7 Dig. Ops., Courts-martial, § 45.8. Since the *Kearney* case, no retired army personnel have been court-martialed. (Some retired army personnel have been called back to active duty for purposes of court-martial for offenses committed during prior active duty. No such case has taken place since October 1953—two years before the decision in *Toth* v. *Quarles*, 350 U.S. 11.)

12 Winthrop's *Military Law and Precedents* (2d ed., 1920 reprint), p. 87, n. 27.

impair that control over those forces which the Constitution vests in the President."

The ruling of the Court of Claims in this case properly gives effect to this history and unbroken line of decisions. Petitioner cites no case which impairs these authorities or is inconsistent with the rationale of the decisions. The recent decisions, as pointed out, depend upon the individual's civilian status or complete severance of all relationships with the military. Indeed, Mr. Justice Black's opinion in *Reid* v. *Covert*, 354 U.S. 1, concurred in by three other Justices, explicitly recognized that the boundary between "civilians" and "members of the 'land and naval forces'" is not a clear one, and indicated that the latter category might include a person who had not been formally inducted into the military and did not wear a uniform (354 U.S. at 22–23). Mr. Justice Harlan, likewise concurring was emphatic in his view that, under Article I, military jurisdiction extends beyond those in actual service as soldiers in the armed forces (354 U.S. at 70–71).

There is thus no conflict of authority among applicable decisions of this Court or other courts. In this case, moreover, there was no personal restraint imposed at any stage of the proceedings. Petitioner's punishment was limited to dismissal from the service and termination of pay received as a result of that status. There is no occasion to consider questions not directly presented, for example, whether the jurisdiction conferred by Article 2(4) could validly be ex-

ercised to sentence a convicted defendant to a fine or imprisonment. This Court has consistently refused invitations to consider the constitutionality of statutes as applied to situations not before the Court. *United States* v. *Raines*, 362 U.S. 17.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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